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May 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 18, 2004

Case No.: TIA-0264

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits on behalf of her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the illness was not related to work at the DOE. The OWA accepted the Panel's determination. The Applicant's son and authorized representative (the Appellant) filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), stating that the Applicant had died and that he (the son) was filing the appeal. As explained below, we have determined that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at

a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a physician panel, a negative determination by a physician panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D.¹ Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.² Subpart E provides that all Subpart D claims will be considered as Subpart E claims.³ OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a supervisor of the technical services support group and senior project engineer at the DOE's Fernald site (the site) for approximately 34 years, from 1952 to 1986.

The Applicant filed a Subpart D application with the OWA, requesting physician panel review of one illness, kidney cancer. The Applicant claimed that the Worker's illness was the result of being exposed to radiation and toxic substances during his work at the site. The Applicant also filed a Subpart B claim at the DOL. The DOL referred the application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. The Applicant elected to send her Subpart D application to the Physician Panel without waiting for

¹ Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).

² See *id.* § 3675(a).

³ See *id.* § 3681(g)

the results of the dose reconstruction.⁴ Accordingly, the OWA sent the case to the Panel without a dose reconstruction.

The Physician Panel rendered a negative determination with regard to the claimed illness. The Panel agreed that the Worker had kidney cancer, but concluded that it was not related to exposure to toxic substances at the DOE site. The Panel found that the Worker was exposed to relatively low levels of radiation, stating "he sustained 11.6 rem (shallow dose equivalent) and 1.2 rem (deep dose equivalent)." The Panel stated that kidney cancer has been associated with exposure to lead, cadmium, petroleum products and polycyclic aromatic hydrocarbons, but determined that the Worker did not have significant occupational exposure to these substances.

The OWA accepted the Physician Panel's negative determination, and the Appellant filed the instant appeal. In his appeal, the Appellant asserts that the Worker was exposed to far more radiation than the amount documented in the record. In support of his assertion, the Appellant provided newspaper articles, Congressional testimony, excerpts from investigative reports, and case studies involving Fernald workers. The Appellant also stated that the Applicant received compensation from the Fernald workers' settlement fund.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Appellant's argument that the Worker's exposure records were inaccurate does not demonstrate Panel error. The

⁴ See Record at 6 (Case view history, entry for April 14, 2004).

Panel evaluates the exposure information in the record. Based on the available dosimetry reports and other occupational exposure records, the Panel concluded that the Worker's radiation exposure was not a factor in his kidney cancer. If the Appellant receives a NIOSH dose reconstruction that he believes supports the application, he should raise the matter with the DOL.

Finally, the fact that the Applicant was compensated through the Fernald workers' settlement fund does not indicate Panel error. The Panel applied the "at least as likely as not" standard required by the Rule and determined that the claimed illness was not related to workplace exposures. The Fernald workers' settlement fund is a separately-administered settlement program and, therefore, is not a basis for concluding that the Worker meets the standard of the Physician Panel Rule.

As the foregoing indicates, the Appellant has not identified Panel error and, therefore, the appeal should be denied. In compliance with Subpart E, this claim will be transferred to the DOL for review. OHA's denial of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0264, be, and hereby is, denied.
- (2) The denial pertains only to this appeal and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 25, 2005